Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HERBERT DERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Government conceded and the First Circuit found that the district court had committed *Apprendi* error and the rule enunciated in *Apprendi* is available to petitioner. The First Circuit's denial of petitioner's motion to vacate his sentence is based in part on procedural default.

1. In pre-*Apprendi* cases in which the rule enunciated in *Apprendi* is available because judgments were not final when *Apprendi* was issued, were defendants on notice to move for a jury finding of drug quantity, or suffer procedural default under *Bousley v. United States*?

2. Is the rule enunciated in *Apprendi* "novel," so that defendants in pre-*Apprendi* trials who failed to request a jury finding of drug quantity are not procedurally barred from the benefits of *Apprendi*?

Quantity and foreseeability of quantity of marijuana were contested, and were estimated by the trial court based on the size and duration of the grow; no physical evidence was found. The First Circuit nevertheless concluded that the *Apprendi* error was harmless.

3. As *Apprendi* error means sentencing was not within the meaning of the Fifth and Sixth Amendments, is there a basis for harmless error analysis when there is *Apprendi* error, and if so, when does harmless error give way to a defendant's Fifth and Sixth Amendment constitutional rights?

Sentencing by the trial court was based on the quantity of marijuana the trial court determined was reasonably foreseeable to the defendant co-conspirator. The First

Circuit determined that foreseeability of quantity may be decided by the trial court based on a preponderance of evidence.

4. Does the rule enunciated in *Apprendi* encompass a jury determination of foreseeability of the quantity of drugs, where the defendant is charged as a co-conspirator?

LIST OF PARTIES

All parties appear in the caption of the case. A corporate disclosure statement is not required.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The district court's order (by Michael A. Ponsor, D.J.) denying petitioner's initial motion pursuant to 28 U.S.C. § 2255 seeking to vacate his sentence in light of *Apprendi* (Appendix ("Pet. App." A-2 to 11) is unpublished. A certificate of appealability was denied by the district court (Pet. App. A-12 to 13). The First Circuit granted a certificate of appealability (Pet. App. A-14 to 15). The First Circuit's opinion (by Selya, C.J., joined by Lynch, C.J. and Schwarzer, D.J. Northern District of California, sitting by designation) affirming the order of the district court (Pet. App. A-16 to 36 is published at 298 F.3d 34 (1st Cir. 2002).

STATEMENT OF JURISDICTION

The First Circuit entered its opinion and order on July 25, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The initial motion to vacate was brought pursuant to 28 U.S.C. § 2255. 21 U.S.C. 841(b)(1)(D) provides a statutory default maximum of sixty months for this case. Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States to fact finding by a jury beyond a reasonable doubt of the quantity of marijuana and quantity that was reasonably foreseeable, are in issue in this petition. Each of these is represented in Pet. App. A-1.

STATEMENT OF THE CASE

Petitioner was charged with eight counts stemming from an underground marijuana-grow beneath a retail nursery, which others leased and operated on a small portion of his property in western Massachusetts. The jury convicted petitioner of only one substantive count: conspiracy. He was found not guilty on six other substantive counts including possession and money-laundering, and guilty of criminal forfeiture.

At the time of his incarceration, petitioner was sixty-eight years of age. He had no prior criminal record whatsoever, and had been a practicing attorney in New York City for more than forty-three years. Petitioner resided in New York City. He used the modest house on the opposite side of his Massachusetts property which was almost one mile from the grow, as a weekend and vacation house. The marijuana operation ended four years before its existence became known to the Government. Not one plant was found on the petitioner's property.

The operators alleged that petitioner had knowledge of the grow and they entered into plea bargains. All of them were released from prison within approximately twenty-four months; petitioner, who protested his innocence, received a sentence of one hundred twenty-one months, and has already served more than four years.

The trial court, not the jury, made a factual finding as to quantity as well as the amount of marijuana reasonably foreseeable to petitioner, using a preponderance of the evidence standard. No motion was made at trial, sentencing or on direct appeal to have the jury decide, beyond a reasonable doubt, the quantity of marijuana and the amount reasonably foreseeable by petitioner. Quantity and foreseeability were vigorously contested by petitioner.

During deliberations the jury asked the trial court three questions, all relating to petitioner's involvement: when and how does a conspiracy end; if a person disassociates

himself from the conspiracy, does that mean he is still part of it; and if a person has knowledge only of a conspiracy and does nothing to stop the illegal act, is he part of that conspiracy? It then found him not guilty of six substantive counts and convicted him only of conspiracy. We speculate that the jury thought it was giving petitioner a slap on the hand.

The underground grow was the size of several tennis courts, and went on for at least five years. The trial court estimated quantity based on the size and duration of the grow, and a subjective judgment of petitioner's foreseeability.

At the sentencing hearing petitioner (by his attorney and personally) strenuously contested the quantity of marijuana being considered as well as his ability to foresee what amount might have been grown by others. The trial court conceded at sentencing that the Government had produced little evidence that petitioner had benefited financially from the marijuana operation.

Petitioner was sentenced to one hundred twenty-one months, which exceeded by sixty-one months the default statutory maximum applicable to conspiracy regarding an unspecified quantity of marijuana, the crime of which he was convicted.

The *Apprendi* decision was issued fifty-two days after the First Circuit denied petitioner's direct appeal, but thirty-eight days before his judgment became final. His motion to vacate contains claims in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that the sentence was imposed in violation of the Constitution of the United States and is in excess of the maximum authorized by law.

The underlying facts involve no hard drugs, no violence, no guns, no confessions, stipulations, or plea bargains and no recidivism. Petitioner represents no danger to society. This petition raises no issue of retroactivity.

The First Circuit determined that petitioner was procedurally barred from the application of the *Apprendi* rule because he failed at trial and on direct appeal to assert his right to have the jury determine quantity of marijuana, although *Apprendi* first announced that right more than five weeks after the First Circuit denied his direct appeal. Petitioner argued, but the First Circuit ignored, the issue of whether the rule enunciated in *Apprendi* is "novel."

The First Circuit also rejected as well petitioner's claim that the trial court should have submitted to the jury the question of what drug quantity was reasonably foreseeable by petitioner as a co-conspirator. The court reasoned that it was for the trial court not the jury, to determine by a preponderance of evidence the quantity of drugs reasonably foreseeable, after the jury determines the quantity.

The force behind the First Circuit's decision in this case is the Court's conclusion that no jury could have reasonably found the quantity of marijuana to have been less than that found by the trial court, given the size and duration of the operation; that is, that the *Apprendi* error was harmless. That finding of quantity was inherently subjective because there was no hard evidence of quantity such as seizure of plants, and petitioner contested the finding of quantity and foreseeability. The finding of foreseeability by the trial court adds another, significant layer of subjectivity. These circumstances are the basis for petitioner's claim that the trial court's application of the harmless error analysis should have been superseded by his constitutional right to have this matter decided by the jury using the beyond a reasonable doubt standard.

Petitioner's first and only motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255 was timely filed on April 27, 2001. That motion was denied by the district court on October 12, 2001. Petitioner's request for a

certificate of appealability was denied by the district court on November 26, 2001.

Petitioner filed an application for a certificate of appealability with the First Circuit on December 28, 2001, which was granted as to sentencing issues on February 26, 2002. Petitioner's application for a certificate of appealability, which included the issue of his criminal forfeiture judgment regarding his property, was granted by the First Circuit as to sentencing matters, but denied as to forfeiture.

Petitioner has filed a separate petition with this Court, pro se, for a writ of certiorari regarding only the forfeiture issue, which was denied. His counsel of record and law firm herein have served petitioner *pro bono*, since the filing of his initial § 2255 motion, and continue to do so.

Jurisdiction of the First Circuit vested under 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

Petitions based on *Apprendi* are probably greeted with ambivalence; the Justices of this Court differ about the decision and at least one Justice warns of ongoing harm to the judicial system caused by the decision. There are, however, many significant *Apprendi*-related issues about which the circuit courts are in conflict, and which warrant clarification. There was *Apprendi* error in this case and the rule enunciated in *Apprendi* is available to petitioner. This case presents other significant *Apprendi*-related issues based on facts unburdened by hard drugs, weapons, violence or recidivism.

There is an understandable tendency to circle the procedural default – harmless error wagons in cases involving guilty pleas, hard physical evidence of drugs, uncontested quantities of drugs, and recidivist heroin and cocaine pushers. This case involves none of these. There seems to be apprehension about the implications of *Apprendi*. It is worth pausing briefly to examine the basis

for this apprehension. There initially was apprehension that *Apprendi* would open prison doors for recidivist drug pushers. As *Apprendi* has not been applied by circuit courts on collateral review, the window of opportunity for defendants is limited and closing fast. *See e.g., In re Joshua*, 224 F.3d 1281 (11th Cir. 2000). *Apprendi* is further limited to sentence enhancement beyond the statutory maximum, and does not apply to sentences within the statutory range. This is the basis for denial of a substantial percentage of motions. Prior convictions are sentencing factors. The United States Sentencing Guidelines are not invalidated. *Apprendi* does not apply to factors involved in the imposition of the death penalty. Even when sentences have been vacated, they are often merely reduced, but remain long. The initial fear that many recidivist drug pushers would be turned loose is wrong. That "floodgate" theory has proven to be unfounded.

Another more recent "floodgate" theory refers to the volume of motions which have burdened the district courts. We have seen reference to approximately 1,800 such motions. These are motions, not trials. Respectfully, that seems a relatively small, short-term price to pay for enforcing a fundamental constitutional right. The real impact of *Apprendi* is prospective; that is, the effect on criminal trial procedure, and that impact is significant and positive.

Three issues are presented: (1) whether petitioner's constitutional rights under *Apprendi* were procedurally defaulted in accordance with *Bousley v. United States,* 523 U.S. 614 (1998); (2) whether harmless error analysis applies to *Apprendi* error cases and, if so, whether harmless error properly supersedes the Sixth Amendment right to a jury under the circumstances of this case; and (3) whether foreseeability of quantity is also a fact to be

determined by the jury beyond a reasonable doubt under the rule enunciated in *Apprendi*.

I. The Unwarranted Expansion Of *Bousley* By The First Circuit And Other Courts

The gravamen of the First Circuit's decision in this case appears to be procedural default, although harmless error may have driven the court's decision. As this Court knows, the procedural default or bar doctrine asks the question whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. The next question is whether petitioner's attorney was on notice to move for a jury determination of quantity, or is *Apprendi* novel so as to obviate the need for such a motion?

In *United States v. Olano*, 507 U.S. 725 (1993), this Court reserved judgment on what happens when the error was unclear at the time of trial, but becomes clear on appeal because the applicable law has been clarified. Here the law was not clarified until after the First Circuit had denied the appeal, but before the judgment was final.

The only arguable justification for placing procedural default before petitioner's vital constitutional rights would be if a precursor to *Apprendi* gave his trial or appellate attorney clear warning. Yet contrary to the First Circuit's reasoning, it cannot be denied that *Apprendi* changed the legal landscape faced by petitioner at trial and during direct appeal. Prior to *Apprendi*, the standard jury instruction in drug cases advised that quantity was not an issue for consideration, and that is precisely what the trial court did in this case. The trial court said at oral argument of this § 2255 motion: "At the time I imposed the sentence it was a perfectly legal sentence. It's a legal procedure that had been followed hundred if not thousands of times. I made the decision based on the proper quantum of evidence and using the proper standard . . . " This is directly at odds with the trial court's finding that

there was procedural default based on trial procedures that should have been obvious to petitioner's attorney.

Is there a precursor to *Apprendi* that gave notice? In *Jones v. United States*, 526 U.S. 277 (1999) this Court interpreted the federal carjacking statute, 18 U.S.C. § 2119. In what was *dictum* this Court in *Jones* expressed doubt about the exercise of broad legislative powers allowing judges to make determinations regarding sentencing limits, thereby inviting an erosion of the jury's function. In *Apprendi* the Supreme Court formerly adopted the *dictum* from *Jones*.

Three points need be made: *Jones* is a 1999 decision and petitioner's trial was in 1998; the relevant language in *Jones* was *dictum*; and *Jones* was not a drug case.

During the two decades before *Apprendi*, the question seemed to be settled that a valid sentence could be imposed on the basis of fact-finding by the trial judge by a preponderance of evidence. Prior to *Apprendi* the law specifically rejected the idea that drug quantity is a material element under the federal drug statute as stated by the Eighth Circuit in *United States v. Grimaldo*, 214 F.3d 967, 967 (8th Cir. 2000). Historically, other circuits had held the same, even after *Jones*, interpreting the *dictum* in *Jones* as a suggestion rather than a rule. *See e.g., United States v. Angle*, 230 F.3d 113, 122 (4th Cir. 2000).

In *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001), which involves drug quantity, the Second Circuit held that there was no precursor to *Apprendi*. Following an *en banc* argument, the Second Circuit in *Thomas* said that *Jones*:

> . . . applied only to the particular statute interpreted in the case [carjacking statute] and did not, generally, 'rewrite the law regarding what facts must be determined by a jury rather than a judge.' We thus join every other circuit that had considered the question in holding

> that, after Jones, drug quantity remained a sentencing factor to be determined by the district judge . . .

Thomas, 274 F.3d at 661.

The *Thomas* Court then notes that *Apprendi* changed all that. Petitioner's attorneys therefore did not have the requisite prior notice of the *Apprendi* rule to justify the imposition of procedural default in this case.

The unfortunately titled Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), passed in 1996, brought sweeping changes to the system of habeas corpus motions. AEDPA ratified the trend toward creating statutory sentencing enhancements based on factors that historically had been considered by judges to justify a harsher sentence under the existing range of sentences for the offense. In *Jones* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (which also is not a drug case), this Court began to review those changes. But only by *Apprendi* did this Court reign in what it perceived to be the erosion of fundamental due process rights in sentencing. Indeed, *Apprendi* specifically distinguishes itself from *Almendarez-Torres*, and from *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) as well.

Even the question of pre-*Apprendi* notice seems ludicrous in view of the fact that before *Apprendi*, every federal district court in the land, with the blessing of every federal circuit court in the land, held drug quantity to be a sentencing factor to be determined by the district judge.

Is the rule enunciated in *Apprendi* novel?

The underlying Supreme Court rulings on procedural default are set forth in a pair of decisions: *Bailey v. United States*, 516 U.S. 137 (1998), and *Bousley v. United States*, 523 U.S. 614 (1998). *Bailey* involved one of the federal firearms statutes, 18 U.S.C. § 924(c), and held, narrowly, that "use" connoted active employment. *Bousley* involved the same statute and the issue of

procedural default arose because the defendant had not challenged the validity of his guilty plea on direct review, and had warning from *Bailey*.

It is submitted that the First Circuit and other circuits have extended the meaning of *Bailey* and *Bousley* far beyond what this Court intended. *Bailey* and *Bousley* do not even involve quantity of drugs and seem far removed.

Even if *Bousley* was correctly relied on by the First Circuit, it tells us that where a defendant has procedurally defaulted by not raising at trial or on appeal an error that occurred at trial, he forfeits his rights, *unless he can demonstrate cause for the omission, and actual prejudice*, meaning that the error affected the outcome. *Bousley* also tells us that a claim of error regarding a rule that is sufficiently *novel* so that its legal basis is not realistically available to defendant's counsel, may constitute the requisite "cause." *Id., see also Reed v. Ross*, 468 U.S. 1, 16 (1984).

In *Bousley*, the defendant's claim of novelty was rejected. What was that claim, why was it rejected, and is it instructive in this case? In trying to overcome his guilty plea, *Bousley* argued that it was error for the district court to misinform him as to the statutory elements of the firearm statute. *Id.* at 622. The Court concluded: "The argument that it was error for the District Court to misinform petitioner . . . was surely not a novel one." *Id.* at 623. *Bousley* merely states the obvious: the claim that it was error for a court to misinform a defendant is not novel.

It is wrong and unfair to extrapolate from the *Bousley* Court's finding of lack of novelty of a claim of misinformation given by a court, that the watershed rule enunciated in *Apprendi*, which "no one anticipated," *United States v. Gutierrez Rodriguez*, 288 F.3d 472 (2d Cir. 2002), was procedurally defaulted by petitioner's trial

counsel two years before *Apprendi* and a year before *Jones*.

The first place to look to determine the novelty of the rule enunciated in *Apprendi* is the *Apprendi* decision. The dissenting opinion of Justice O'Connor in *Apprendi* characterizes the majority holding as follows:

> In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a *single instance*, in over 200 years since the ratification of the Bill of Rights that our Court has applied, as a constitutional requirement, the rule that it announces today.

530 U.S. at 525.

Surely Justice O'Connor found the majority ruling novel.

As noted in *Reed v. Ross*, 468 U.S. 1 (1984), which contains a lengthy discussion about procedural default and "cause" that is applicable to this case:

> . . . 'cause' arises where a new constitutional rule overturns 'a longstanding and widespread practice to which this court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

468 U.S. at 17.

There was no such body of authority before *Apprendi*. The ruling by the First Circuit in this case that petitioner is procedurally barred in accordance with its interpretation of *Bousley* is irreconcilable with *Reed*.

The claim found in *Reed* to be "novel" involved a claim that a criminal defendant had been deprived of due process by an instruction that failed to require the prosecution to bear the burden of persuasion with respect to each element of a crime. *Reed* was cited by the United

States Supreme Court in *Bousley*. How "novel" is that claim compared to the *Apprendi* rule.

Petitioner claims that the new constitutional rule in *Apprendi* overturns longstanding and widespread practice, and the *Apprendi* decision was not generally anticipated and was novel. *See United States v. Gutierrez Rodriguez*, 288 F.3d 472 (2d Cir. 2002). As stated by the Sixth Circuit in *United States v. Humphrey*, 287 F.3d 422 (6th Cir. 2001) in reaction to an expansive application of procedural default, this is not a "parlor game." 287 F.3d at 443.

The First Circuit relies on *United States v. Frady*, 456 U.S. 152 (1982). *Frady* involved a 1979 collateral attack on a 1963 murder conviction, claiming error in a malice instruction. Defendant waited 16 years to raise a readily available claim. The *Frady* Court's limited discussion of "cause" is hardly instructive in this case.

Bousley and *Frady* have little relationship to this case. We respectfully submit that *Bousley* and *Frady* have also been badly used by several circuit courts of appeal. We refer to *United States v. McCoy*, 266 F.3d 1245 at 1258 (11th Cir. 2001); and *United States v. Moss*, 252 F.3d 993, at 1001-1002 (8th Cir. 2001).

McCoy involved review of a plea of guilty to possession with intent to distribute crack cocaine. *McCoy* never even filed a direct appeal. The *McCoy* court doubted the novelty of *Apprendi* as, "*Apprendi* himself raised the issue . . . ." *Id.* at 1258; therefore, how novel can it be. The logical extension of that reasoning is that a novel rule can never be found because the issue is ultimately raised. This line of reasoning begs the question. Respectfully, this is not the stuff of "reasonable availability" that this Court contemplated in *Bousley*.

The concurring opinion by Circuit Judge Barkett in *McCoy* must be read. The Judge destroys the "futility" argument; that it would have been futile to object is no

excuse for not objecting, nor does it show novelty. After explaining the correct, limited meaning of the "futility" argument in *Bousley* and *Engle v. Isaac*, 456 U.S. 107 (1982), Judge Barkett states:

> It is one thing to preclude, as an excuse, the wholesale speculation that an argument *not presented* in the state courts would be futile; it is quite another to say that the cause should not be recognized when a lawyer declines to make an argument in federal court because every single appellate court has already ruled against his position.

McCoy, 266 F.3d at 1274.

Judge Barkett concludes in a manner which sums up petitioner's position regarding procedural default:

> *To penalize a petitioner for failing to make a claim on appeal that had been specifically rejected by every circuit in the country would be patently unfair.* I think it is plain that, in this context, the argument was not reasonably available and there is accordingly cause to excuse the failure to raise the claim earlier.

Id. at 1273. (emphasis added).

In *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001), the Court provides no references to support its conclusion that Moss' *Apprendi* claim was reasonably available, except two journal articles published in 1992. A dissenting opinion refers to the dissent in *Apprendi* establishing the absence of pre-*Apprendi* "availability."

Id. at 1005-06.

Once *Bousley* was badly used, successive circuit courts have repeated the same mistake citing the same cases. Respectfully there is a huge and deeply troubling gap in reason, logic and conclusions between the treatment of "reasonable availability" in *Bousley*, *Reed*, *Thomas* (2d

Cir.) and *Gutierrez Rodriguez* (2d Cir.), versus *McCoy* (11th Cir.), *Moss* (8th Cir.), *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); and *United States v. Smith*, 241 F.3d 548 (7th Cir. 2001), among other cases. *Bousley* needs to be clarified to prevent further misuse.

II. Harmless Error

If *Apprendi* error occurs and is otherwise available, is harmless error analysis ever appropriate? If so, under what circumstances does the Sixth Amendment overcome that analysis? Petitioner answers the first question affirmatively; the harmless error standard has a place in *Apprendi* cases. *Petitioner is not asking this Court to rule out harmless error analysis whenever Apprendi error is found.* The issue raised by this petition is where the line is properly drawn? When is harmless error superseded by a superior right to have the jury make the factual determination using the beyond a reasonable doubt standard of evidence? Petitioner urges that by virtue of the particular facts in this case, harmless error analysis should have given way to his Fifth and Sixth Amendment rights.

It was made clear in this case during oral argument both at the district and circuit courts that the evidence was perceived to be overwhelming based on the size and duration of the grow, and the relatively limited number of plants needed to justify the enhanced sentence; all else was mental gymnastics (e.g. Pet. App. A-8). It was reasoned that based on what the trial court determined was overwhelming evidence, there was no "prejudice," and the conceded, significant error was therefore "harmless." Respectfully, this misses the point that under the facts in this case, petitioner's constitutional right to a jury determination of quantity superseded that harmless error analysis.

The decisions of the circuit courts are inconsistent to a frustrating degree. One line of cases avoids the rule

enunciated in *Apprendi* simply by applying harmless error or plain error analysis. Some of these cases give the unfortunate impression of being outcome oriented, even disdainful of *Apprendi*. Many of these cases do not even make a passing reference to the Sixth Amendment. Trial courts decide in advance how juries would see the evidence, and thereby deprive juries of the opportunity.

Another line of cases by the circuit courts do the reverse: these cases uphold the Sixth Amendment right to a jury determination of any fact which forms an element of the crime and ignore the harmless error standard, at times simply by-passing seemingly overwhelming evidence of quantity in deference to the right to a jury determination.

The articulated demarcation between these two lines of cases ranges from chaotic to non-existent. With due respect, the jurisprudence regarding the relationship between the Sixth Amendment and harmless error analysis is too chaotic to be instructive.

We are unable to find one *Apprendi* case which articulates a clear demarcation when harmless error gives way to the Sixth Amendment right to a jury determination of quantity of drugs, or *vice versa*. *Petitioner is not questioning the applicability of harmless error to cases in which quantity is admitted or uncontested, or there is hard physical evidence.* In this case, however, quantity was controverted. In this case there was no hard physical evidence. The trial court nevertheless imposed its own subjective view of quantity and foreseeability based on a preponderance of evidence standard, thereby taking both of those issues away from a jury that appeared to be sympathetic to the petitioner. It is submitted that the First Circuit's application of harmless error analysis to a case in which the quantity of drugs is contested and a determination of quantity requires subjectivity, eviscerates the rule enunciated in *Apprendi*.

It is troubling that if this case arose in the Second Circuit, where petitioner resided, that Court would likely have found that the sentencing error affected petitioner's substantial rights, regardless of the evidence. *See e.g., United States v. Zillgitt*, 286 F.3d 128 (2d Cir. 2002). This inconsistency has been played out time and again among the circuits throughout the country.

We start with *Apprendi*. The holding in *Apprendi* is based on the right of the accused under the due process clause against punishment, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Any fact enhancing a sentence beyond the maximum amount authorized by statute is the functional equivalent of an element of a greater offense. The rationale for *Apprendi* goes beyond the racial bias statute in that case. It has to do with *effect*: would the finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict? It is the *effect* that the factual finding has on the defendant's sentence which determines whether it is an element of the offense or a sentencing factor. *Apprendi* is concerned with the preservation of the structure of criminal procedure under the Fifth And Sixth Amendments. It is about apportioning the respective responsibilities of the jury and judge in finding the facts that bear on punishment.

If it is the *effect* of the fact on punishment that is determinative, and sentence enhancing facts must be determined by the jury, logic would seem to dictate that the trial court may not usurp that constitutional right by determining for itself in advance what a jury might reasonably decide. This principle was perhaps most clearly stated by Justice Scalia in his concurring opinion on the subject of harmless error in *Carella v. California*, 491 U.S. 263, 2668, (1989), in which he was joined by Justices Brennan, Marshall and Blackmun. After reference

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to the fact-finding function which in a criminal case the law assigns the jury, Justice Scalia says:

> The constitutional right to a jury trial embodies 'a profound judgment about the way in which the law should be enforced and justice administered.' It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers of the life and liberty of the citizen to one judge or to a group of judges.' A defendant may assuredly insist upon observance of this guarantee *even when evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.*

Id. at 268 (internal citations omitted) (emphasis added).

Petitioner concedes that *Carella* deals with guilt or innocence but *Carella* is relied on in the Second Circuit's Apprendi-based decision in *United States v. Zillgitt*, 286 F.3d 128 (2d Cir. 2002), which applies *Carella's* reasoning to the issue of punishment.

In *Sullivan v. Louisiana,* 508 U.S. 275 (1993), the majority decision was also written by Justice Scalia, who said:

> The prosecution bears the burden of proving all of the elements of the offense charged and must persuade the fact-finder 'beyond a reasonable doubt' of the facts necessary to establish each of these elements.

Id. at 277-78. (internal citations omitted)

As quantity of drugs is an element of the offense to be decided by the jury beyond a reasonable doubt, it would seem to follow that harmless error analysis has no place. Again, petitioner does not urge such a sweeping conclusion. Rather, petitioner urges that harmless error

analysis has a place when drug quantity is conceded or not contested, or when there is hard physical evidence which avoids the need for estimates or subjectivity.

In the following cases the evidence of drug quantity was substantial, yet sentences were vacated in light of *Apprendi*: *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Fields*, 242 F.3d 993 (D.C. Cir. 2001); *United States v. Henry*, 282 F.3d 242 (3d Cir. 2002); *United States v. Garcia*, 242 F.3d 593 (5th Cir. 2001); *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001); *United States v. Rodriguez*, 262 F.3d 1024 (9th Cir. 2001); *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001); and *United States v. Zillgitt*, 286 F.3d 128 (2d Cir. 2002). The circuit courts in these cases see the Sixth Amendment "trumping" the harmless error standard. Had this case arisen in any of these circuits, it is reasonable to conclude that petitioner would have been resentenced to sixty months, down from one hundred twenty months.

In the following cases the circuit courts denied motions based on *Apprendi* to vacate sentences, citing harmless error (or plain error), and relying on such circumstances as the trial court's perception of the weight of the evidence, stipulation as to quantity, plea bargains, or confessions: *United States v. Mojica Baez*, 229 F.3d 292 (1st Cir. 2000); *see also United States v. Duarte*, 246 F.3d 56 (1st Cir. 2001); *United States v. Terry*, 240 F.3d 65 (1st Cir. 2001); *United States v. Patrick*, 248 F.3d 11(1st Cir. 2001); *United States v. Parrilla-Sanes*, No. 99-2158, 2001 WL 355563 (1st Cir. Apr. 9, 2001); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000); *United States v. Strickland*, 245 f.3d 308 (4th Cir. 2001) and *United States v. Bear*, No. 00-3996, 2001 WL 548570 (8th Cir. May 24, 2001).

These circuit courts seldom if ever explain where the line is drawn between harmless error analysis and Sixth

Amendment rights, and why the other alternative is rejected. Yet most of these cases seem to be reconcilable by application of the following principle which we have not seen articulated in any federal court case: in drug cases in which quantity has been conceded or is otherwise not contested, or is established by hard physical evidence which eliminates the need for subjectivity, the benefits of the rule enunciated in *Apprendi* are properly denied by application of the standard of harmless error. In cases in which quantity is contested, or hard physical evidence is lacking, requiring some degree of subjectivity to determine the fact, the constitutional right to a jury determination prevails *regardless* of how overwhelming the evidence is seen to be by the trial court. This guiding principle emphasizes *substantial rights*, not the trial judge's perception of the evidence, and that is why we urge that in some cases, including this one, the kind of the evidence makes the perception of the trial judge irrelevant.

A review of the evidence in this case establishes that the decision of the First Circuit violates *Apprendi*. What was the "overwhelming" evidence that the trial court relied upon in determining that the jury's involvement was unnecessary: not a single plant was found on petitioner's property; a finding of quantity was based on estimates; the issues of quantity and foreseeability were contested; the extent of petitioner's involvement was contested; and the jury's questions indicate doubts about the extent of petitioner's involvement and therefore his foreseeabilty. The First Circuit and the trial court understandably emphasized the size and duration of the marijuana grow, but *that misses the point*. It is the kind of the evidence, or lack thereof, and its *effect* on punishment that mandates the right to a jury finding-of-fact, based on the beyond a reasonable doubt standard.

The First Circuit applied harmless error in this case, but the same analysis applies to plain error Under plain

error. standards of fairness, substantial rights and prejudice apply.

Chief Judge Miner wrote the decision of the court in *United States v. Zillgitt*, *supra* which held that a general verdict on a conspiracy charge involving multiple controlled substances required a sentence within the 60-month statutory minimum relating to an indeterminate amount of marijuana, and plain error resulted from the improperly enhanced sentence. 286 F.3d 128 (2d Cir. 2002). That Court said much about these standards that is relevant herein:

> An error 'affects substantial rights' if it was 'prejudicial,' meaning that it 'affected the outcome of the district court proceedings.' The defendant bears the burden of demonstrating prejudice. Zillgitt was sentenced to 109 months' imprisonment, rather than a term not exceeding the statutory maximum sentence. . . We find this result prejudicial. *See Thomas*, 274 F.3d at 666 ('*It is beyond cavil that imprisonment for an additional 52 [sic] months beyond the penalty authorized by Congress . . . constituted prejudice); see also Nordby*, 225 F.3d at 1001 (holding that significant increase in sentence constitutes plain error, thereby implicitly affecting defendant's substantial rights). Moreover, we have recently held that '[i]f the error is a sentencing error, the prejudice is clear.' *Guevara*, 277 F.3d at 124.

Id. at 139. (emphasis added)

The *Zillgitt* court did not dwell upon the meaning of "prejudice;" common sense and the plain meaning of the word dictate that an eighty percent enhancement of sentence is prejudicial. The enhancement of petitioner's sentence is even greater. This is consistent with the

reasoning in *Apprendi* that it is the *effect* of the fact-finding on punishment that is relevant.

The Second Circuit goes on to make the identical point to the one previously made herein regarding the need for fact-finding by the jury, not the trial judge, citing the same Supreme Court concurring opinion in *Carella*:

> Finally, we agree with the Tenth Circuit that 'it is inappropriate for an appellate court to weigh the evidence in the jury's stead.' This is based on the fundamental principle that '[a] defendant may assuredly insist upon observance of [the constitutional right to a jury trial] even when the evidence is overwhelming as to establish guilt beyond a reasonable doubt.' Thus, *even assuming there was more than enough evidence supporting a conspiracy involving cocaine*, we find the district court's sentencing error affected *Zillgitt's* substantial rights.

Id. at 130. (internal citations omitted).

The *Zillgitt* court exercised its discretion to correct the *Apprendi* error because that error seriously affected the "fairness and public reputation of the judicial proceeding" *due to the magnitude of the increase in sentence. Id.* at 141. *Zillgitt*, which was decided on April 4, 2002, addresses concepts that are relevant in this case: prejudice, substantial rights, fairness of the proceeding, as well as the issue of "overwhelming evidence," and, using reasoning contrary to the reasoning of the First Circuit in this case, grants the defendant's motion to vacate.

This case deserves to be part of the incremental approach being taken by the Supreme Court in solving the matter of apportionment of responsibilities between judge and jury.

III. Foreseeability

Is determination of foreseeability of quantity of drugs encompassed within the rule enunciated by *Apprendi*? What evidentiary standard applies to determining foreseeability? To the best of our knowledge this Court has not addressed these issues, and few of the circuit courts have either.

In this case the First Circuit, relying primarily on *Edwards v. United States*, 523 U.S. 511 (1998), acknowledged that although quantity of drugs was a fact for jury determination beyond a reasonable doubt, foreseeability of quantity would thereafter be determined by the trial court, using a preponderance of evidence standard. The First Circuit interpreted *Edwards* in light of *Apprendi* to mean that as long as the court sentences the defendant within the applicable statutory maximum based on quantity found by the jury, it is for the court to determine the amount for which the defendant should be held accountable.

Respectfully, that reasoning is a variance with *Apprendi*. In this case it was foreseeability of quantity, not quantity, which determined the punishment. Foreseeability was the fact that had the effect of determining the sentence, and is therefore an element of the crime of conspiracy. In most drug-related *Apprendi* cases, quantity is the primary issue; in most *Apprendi* cases the co-conspirator is active in the operation and quantity and foreseeability are the same or similar. In this case in which conspiracy is the only count of which petitioner was found guilty and petitioner was not active in the operation, foreseeability is the primary issue for sentencing. It was the trial court's determination of foreseeability which resulted in a sentence more than two times the statutory maximum for an unspecified quantity of marijuana. If *effect* is the gravamen of *Apprendi*, the First Circuit erred in deciding that it was proper for the

trial court to decide the fact of foreseeability by a preponderance of evidence. In this case quantity and foreseeability are so entwined as to be inseparable.

Foreseeability was an issue in the following cases in which the circuit courts did not squarely address whether in light of *Apprendi* the jury or the trial court should determine it. *Apprendi* errors were avoided because of sentencing within the statutory maximum. The question of this exercise of authority by the trial courts when there is *Apprendi* error, seems not to have been addressed except by the First Circuit in this case. *See United States v. Campbell*, 279 F.3d 392 (6th Cir. 2002); *see also United States v. Cooper*, 274 F.3d 230 (5th Cir. 2001); *United States v. Nubuor*, 274 F.3d (435 (7th Cir. 2001); *United States v. Perez*, 280 F.3d 318 (3d Cir. 2002).

Here there is *Apprendi* error. The jury saw petitioner's involvement as peripheral. Foreseeability, which had the effect of doubling the statutory maximum sentence, was decided by the trial court by a preponderance of evidence. Petitioner urges that that too violates the rule enunciated in *Apprendi*.

Determination of foreseeability is, by its nature, subjective. If that fact was properly decided by the jury rather than the trial court, that is one more significant reason why a harmless error analysis should not apply.

CONCLUSION

Petitioner respectfully submits that this case presents important questions about which the circuit courts are in conflict with each other. Some of the circuit courts' decisions are in conflict with this Court's decision in *Apprendi*. These questions have not been, but need to be decided by this Court. Petitioner's rights under the Fifth And Sixth Amendments to the United States Constitution have been violated and are deserving of protection.

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

U.S. CONST. amend. V:

"No person shall be . . . deprived of life, liberty, or property without due process of law. . ."

U.S. CONST. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury, . . . and have the Assistance of Counsel for his defence."

21 U.S.C. § 841

(b) Penalties

. . . any person who violates subsection (a) of this section, shall be sentenced as follows:

(1)(A) In a case of a violation of subsection (a) of this title involving:

(vii) . . .1,000 or more marijuana plants regardless of weight . . .such person shall be sentenced to a term of imprisonment which may not be less than ten years. . .

(1)(D) In the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight, . . . such person shall, . . . be sentenced to a term of imprisonment of not more than five years . . .

28 U.S.C. § 2255

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or that the sentence was in excess of the maximum authorized by law. . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSSETTS

HERBERT DERMAN, Petitioner	)	
v.	)	Civil Action No. 01-30071-MAP
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER REGARDING PETITIONER'S MOTION TO VACATE SENTENCE, AND ORDER OF DISMISSAL
(Docket No. 1)

October 12, 2001

POSNOR, D.J.

Petitioner has filed this action pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence of 121 months imprisonment following his conviction for conspiracy to manufacture and distribute, and to possess with intent to manufacture and distribute, marijuana. Petitioner's sentence was anchored on the court's finding at sentencing that he was responsible for more than one thousand marijuana plants.

The trial and sentencing occurred prior to the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). The determination to attribute tat least one thousand plants to Derman was therefore made by the court at sentencing, and not by the jury as part of a special verdict.

As petitioner points out, the court's attribution of one thousand plants to Derman resulted in a sentence in excess of what would otherwise be the statutory maximum of

sixty months. Based upon this violation of Apprendi, petitioner seeks an order vacating his sentence. In Apprendi, the majority held that every fact, other than a prior conviction, that increases a defendant's sentence beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 490.

The court heard argument on petitioner's motion on October 9, 2001. At that time the court set forth orally the reasons for its decision to deny the Motion to Vacate and dismiss the petition. A transcript of the court's remarks is appended to this memorandum as Exhibit A.

In summary, the court's reasons are as follows. First, Apprendi is not retroactive. As the Eleventh Circuit has recently pointed out, every Court of Appeals that addressed the issue has reached this conclusion. See McCoy v. United States, __ F.3d. __, 2001 WL 1131653, * 10 (11th Cir. September 25, 2001). Despite the resourceful, imaginative and vigorous efforts on the part of petitioner's counsel, all courts have concluded - - and this court agrees - - that the criteria set forth by the Supreme Court in Teague v. Lane, 489 U.S. 288 (1989), will not support a finding that this new constitutional rule of criminal procedure should be applied retroactively on collateral review. Petitioner's trial and sentencing preceded Apprendi; Apprendi does not control.

Second, even if Apprendi did control, the court's error was harmless as a matter of law. No reasonable factfinder, judge or jury, applying any standard, could conclude that Derman's responsibility in the conspiracy extended to less that one thousand plants. The length of the marijuana growing operation (over five years), the size and sophistication of the operation, the number of persons employed and the amount of cash generated indisputably supported the court's conclusion at sentencing that, at a minimum, defendant was responsible for more than 26,000 plants. The fact that the defendant, to some extent,

contested the amount of plants at sentencing, and that the court's decision regarding drug amounts required some amount of rough estimation, given the size of the operation, does not assist the petitioner here.

Third, the defendant failed to object at the trial level, or to appeal to the First Circuit, regarding the court's assumption of responsibility for calculation of the drug amount. This failure to exhaust deprives petitioner of the right to press this claim on collateral review. See United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 145 (4th Cir. 2001). This argument has been cited last, since it is somewhat distasteful to place on trial counsel the responsibility for such a high level of prescience regarding future Supreme court decision making. Nevertheless, courts of appeals have found a failure to exhaust in this context and this bar to collateral review, though troubling, appears to be insurmountable.

Lastly, there was no ineffective assistance of counsel under well established Supreme Court and First Circuit precedent here, and Apprendi does not, as petitioner would argue, apply to forfeiture proceedings.

For the foregoing reasons, petitioner's Motion to Vacate is hereby DENIED, and the petition is hereby ordered DISMISSED.

It is So Ordered.

s/_____
MICHAEL A. POSNOR
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSSETS
WESTERN SECTION

UNITED STATES OF AMERICA	:	Docket No. CR 01-30071-MAP
v.	:	Springfield, MA October 9, 2001
HERBERT DERMAN	:	

EXCERPT OF HEARING HELD BEFORE
THE HONORABLE MICHAEL A. POSNOR,
UNITED STATES DISTRICT COURT JUDGE.

APPEARANCES:

For the government: Kevin O'Regan, Assistant U.S. Attorney
1550 Main Street, Springfield, MA 01103

For the defendant: Richard Miller, Esq., 230 Park Avenue, New York, NY 10169

Alice Moran, CSR, RPR, RMR
Official Federal Court Reporter
1550 Main Street, Room 536
Springfield, MA 01103
Tel: 413-731-0086 Fax: 413-737-7333

(Excerpt of hearing.)

(A recess was taken at 3:57 until 4:15.)

THE COURT: I want to begin by complimenting you, Mr. Miller, on your excellent presentation of these arguments both in writing and orally. I was very surprised to hear this was your first case of this sort because you present it like a veteran and have really given me cause to think before making my decision. But in the end the decision, although it is painful, is not really difficult.

I am going to deny the petition and I'm going to dismiss the complaint. There really isn't any reason to delay here from my point of view as the district court judge. By rendering my decision now, I avoid any protraction of the proceeding and permit you to get right up to the First Circuit and see what they make of these issues. The First Circuit may disagree with me, but the issue seems very clear to me.

There are at lēast three to four reasons why I believe this petition to vacate must be denied and why I think the matter must be dismissed. The first is the exhaustion argument.

I find the argument somewhat distasteful because I think it puts a burden on trial counsel to be more prescient that is reasonable. But I have to say that the case law is absolutely clear that where a claim is not pursued on direct appeal, a defendant must show either cause and prejudice, as that phrase has been construed, or actual innocence. The Supreme Court made that very clear in the Bousley case, B-O-U-S-L-E-Y, in 1998.

The cause and prejudice requirement does apply in the Apprendi situation. A number of courts of appeals have recognized that, including the 11th Circuit in McCoy, which has been cited by the government both on this point and on the retroactivity point.

As reluctant as I am to apply this rule, because I really do think it is an unfair burden on trial counsel, I think the rule and its effects are absolutely clear in this situation, and the failure to raise the Apprendi issue before me and before the Court of Appeals is fatal to this petition under 2255. So that is an arrow that strikes the petition in a fatal spot by itself.

Second, I am absolutely clear that Apprendi is not retroactive. The McCoy decision is clear on that, and I think that, you can dodge this way and you can dodge that way but that retroactivity argument is like a big truck and you can't get out of the way of it. There is no way to avoid the conclusion that the Apprendi decision, however you characterize it, has not so far been found by any court of appeals to be retroactive.

I did look at a number of cases during the break, and I particularly looked at the Jackson case. It is true that the district court judge in Jackson found that Apprendi was retroactive, but then the judge went on to find that the trial court, this was a habeas petition, the trial court complied with Apprendi.

Its kind of easy to find that it's retroactive if you find that there hasn't been a problem anyway. I think it would have been a different outcome if the judge in looking at the petition had determined that there was an error that required the sentence to be vacated and the matter had gone up to the Court of Appeals out there in Michigan.

So I don't think there's any persuasive authority, and I don't think you can really structure the argument in such a way as to avoid the retroactivity point, and that's a second reason why the petition must be dismissed and a second arrow that hits the petition in a fatal spot.

Thirdly, I think there are special reasons why the Randle court and other courts have discarded the harmless error analysis on direct appeal.

I think that harmless error is still an appropriate analysis, and even here where the issue was contested to

some extent, and where my decision was, to some extent, subjective or at least was an estimate, I believe that harmless error analysis is appropriate and I conclude that there is no way that any jury or any factfinder could not have found that this conspiracy foreseeably involved more that one thousand plants.

The length of time that the grow was going on on Mr. Derman's property, the number of people involved, the photographic evidence, the sophistication of the techniques used in the grow, the amount of money generated, the amount of equipment used, the number and regularity of trips to New York to sell the product, all made it clear far beyond any conceivable doubt that this conspiracy foreseeably involved far, far more, many multiples, of one thousand plants.

To the extend that there's any vagueness in my conclusions or any arbitrariness in my calculation, that reflects the hugeness of the operation and my inability, given the vast numbers, to come up with a specific calculation of the plants.

But there is absolutely no question that what was involved here was more than a thousand plants, and, therefore, the failure to present the jury with a special interrogatory or a special question requiring them to specify more than a thousand plants were foreseeably involved in this conspiracy was harmless error as a matter of law and cannot form the basis of any petition under Section 2255.

Next, I find that there was not ineffective assistance of counsel either at the trial level or at the sentencing level. Indeed, Mr. Derman was extremely vigorously represented at both levels. In fact, all three of the attorneys who appeared before me representing Mr. Derman have been outstanding.

Mr. Goldberger did a terrific job for Mr. Derman given the evidence against him and managed to get a number of

the counts - - he managed to get acquittals on a number of the counts.

One thing that I will never understand - - I'm not supposed to understand frankly - - is why Mr. Derman did not relatively early in the process come forward and agree to cooperate which would have saved him from a substantial number of years in prison I'm quite sure. He made the decision to go to trial.

The case was so vigorously contested at the pre-trial phase and throughout the trial, and Attorney Egbert did a very, very vigorous job on his behalf at the sentencing.

The fact that a decision was made, if indeed the decision was made explicitly, not to file a petition for a writ of certiorari immediately after the Apprendi decision came down does not lower the level of representation beneath the standard required for effective assistance of counsel.

If such a judgment was made, and if an attorney-client relationship existed between Mr. Egbert and Mr. Derman, then the decision, although perhaps it might be debatable, the decision not to file a petition for writ of certiorari was within the general scope of what I would call basic competence on the part of Mr. Egbert.

There is some question in my mind about whether a failure to seek a discretionary review can ever constitute ineffective assistance of counsel.

There is a decision in the case of Wainwright, W-A-I-N-W-R-I-G-H-T, v. Torna, T-O-R-N-A, which is at 455 U.S. 586 and specifically at 587 and 588, it's a 1982 Supreme Court decision which suggests that since the defendant has no constitutional right to counsel in pursuing a discretionary appeal, he cannot be deprived of the effective assistance of counsel in pursuing this discretionary appeal.

So I don't know whether that's good law, but it certainly strikes me as unusual to hear the argument that failure to seek a discretionary review can constitute

ineffective assistance of counsel. That may be an argument that is unavailable to Mr. Derman as a matter of law. As a matter of fact, in this case the behavior of Mr. Egbert, as well as Mr. Goldberger, did not fall below any reasonable standard.

Finally, Apprendi does not apply to forfeitures and that argument has not successfully been made before. I do not think that as a matter of policy it really makes sense to try to extend Apprendi to forfeitures. Nevertheless, the argument has been made now and it's on the record. I've considered it; I've rejected it, and anyone reviewing this decision will have an opportunity to reevaluate the issue and decide whether my decision is correct.

In some small percentage of cases, Mr. Miller, I'm able to return my decision orally. I'm not singling you out. I try to do it in - - I actually shouldn't say a small percentage. I'm trying to do it in about 50 percent of the dispositive motions that I have before me these days.

I don't want you to think though, and I certainly don't want Mr. Derman to think, that I haven't considered these arguments carefully and weighed the case law.

The fact that I'm rendering my decision orally is, I hope, an assistance in moving the case along and in making sure that it's promptly reviewed by the Court of Appeals if I've made a mistake.

So the transcript of these oral remarks will constitute my findings of facts and rulings of law on the petition. I will issue a short memorandum within the next day or two and append the transcript of these comments to that memorandum. So nothing is entering right now. No timeline is being triggered.

I'll be putting something in writing and sending it off to you within the next day or two, but I can say that the substance of what my reasoning is is contained in what I've just said in the last 10 or 15 minutes.

I do thank you very much for the excellent briefing and the very, very interesting oral argument but that's my decision. Thank you very much.

MR. MILLER: Thank you very much, Your Honor.

MR. O'REGAN: Thank you.

(Court concluded at 4:26.)

UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSSETTS
CITY OF SPRINGFIELD

I, Alice Moran, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes to the best of my knowledge and ability.

s/_____
Alice Moran, CSR, RPR, RMR
Official Federal Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSSETTS

HERBERT DERMAN, Petitioner,	)	
v.	)	Civil Action No. 01-30071-MAP
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER DENYING
REQUEST FOR CERTIFICATE OF APPEALABILITY
(Docket No. 19)

November 26, 2001

POSNOR, D.J.

Petitioner has filed his Request for Certificate of Appealability following this court's dismissal of his petition under 28 U.S.C. § 2255.

Upon my review of the file of this matter, I cannot fairly issue a Certificate of Appealability. For the reasons summarized by me orally immediately following argument, the claim of a violation of defendant's rights as articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000), lacks any substantial basis. The issue is not debatable, in the sense that some other court might reasonably be expected to resolve the Apprendi-related issues in a manner different from the way this court did in its oral ruling.

Since the defendant has failed to make "a substantial showing of the denial of a Constitution right," the Request for Certificate of Appealability is hereby DENIED.

Petitioner has filed a Notice of Appeal and may be permitted to obtain review of this denial by the Court of Appeals for the First Circuit.

It is So Ordered.

s/_____
MICHAEL A. POSNOR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2545

HERBERT DERMAN,
Petitioner, Appellant,

v.

UNITED STATES,
Respondent, Appellee.

Before

Selya, Circuit Judge,
Campell, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT
Entered: February 11, 2002.

We grant a certificate of appealability limited to the questions (1) whether Apprendi v. New Jersey, 530 U.S. 466 (2000) is retroactively applicable in proceedings under 28 U.S.C. § 2255, (2) whether petitioner's failure to raise the issue at sentencing or on direct appeal constitutes procedural default under Bousley v. United States, 523 U.S. 614 (1998), and (3) whether any Apprendi error committed was harmless.

Because petitioner has not made the requisite showing in regard to the forfeiture of his property, the requested certificate of appealability as to this claim is **denied**.

It is so ordered.

By the Court:
Richard Cushing Donovan, Clerk

By: s/_____
Chief Deputy Clerk.

Certified Copies: **Judge Michael A. Posnor**
Anthony Anastas, Clerk

cc: Richard E. Miller and Kevin O'Regan

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2545

HERBERT DERMAN,
Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,
Respondent, Appellee.

JUDGMENT

Entered: July 25, 2002

This cause came on to be heard on appeal form the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:

s/_____
Richard Cushing, Donovan, Clerk

[cc: Mr. Miller and Mr. O'Regan.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2545

HERBERT DERMAN,
Petitioner, Appellant,

v.

UNITED STATES,
Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF MASSACHUSSETTS
[Hon. Michael A. Posnor, U.S. District Judge]

Before

Selya and Lynch, Circuit Judges,
and Schwarzer,* Senior District Judge.

Richard E. Miller, with whom Kurzman Karelsen & Frank, LLP was on brief, for appellant.

Kevin O'Regan, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, and Dina Michael Chaitowitz, Appellate Chief, were on brief, for appellee.

July 25, 2002.

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* Of the Northern District of California, sitting by designation.

SELYA, Circuit Judge. In this appeal, petitioner-appellant Herbert Derman challenges the district court's denial of his application for post-conviction relief. He argues that the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000) – announced after we rejected his direct appeal but before the expiration of time within which he was eligible to apply for a writ of certiorari – demands that we set aside his conviction. Although his appeal is ably argued and raises intricate issues (including one that has divided our sister circuits and another that is of first impression at the appellate level), it is in the end unavailing. Consequently, we affirm the district court's dismissal of the application for post-conviction relief.

I. BACKGROUND

We limn those facts pertinent to the instant appeal referring readers who crave more exegetic detail to our opinion affirming the petitioner's conviction. See United States v. Derman, 211 F.3d 175 (1st Cir. 2000).

Beginning in 1984, Marcel Rosenzweig oversaw an underground greenhouse on property owned by the petitioner. The venture prospered for several years.

When word of a large-scale marijuana grow leaked in 1991, police officers visited the site. They were thrown off the scent by a legal above-ground greenhouse that Rosenzweig and his cohorts ran to conceal the illegal activities below. Because the officers did not realize what lay beneath, their search revealed only trace amounts of marijuana.

In an abundance of caution, Rosenzweig moved the enterprise to a different locus. The culprits continued growing and distributing marijuana until the federal government cracked the case four years later. A federal grand jury sitting in the District of Massachusetts soon indicted the petitioner and six other persons (including Rosenzweig). The indictment charged the defendants with, inter alia, conspiring to manufacture and distribute

marijuana. See 21 U.S.C. §§ 841 (a)(1), 846. As part of the conspiracy charge, the indictment specifically mentioned a statutory provision mandating a ten-year sentence for conspiracies involving at least 1,000 marijuana plants. See id. § 841(b)(1)(A).

All the defendants, save only the petitioner, pleaded guilty to the charges. The petitioner maintained his innocence, asserting that he had no knowledge of either the underground greenhouse or its unlawful contents. The district court instructed the jury on the standard issues, but not on the question of drug quantity. The jury found the petitioner guilty on the conspiracy count and on a related forfeiture count.[1]

The jury returned its verdict on July 29, 1998. The district court denied the petitioner's post-trial motions and scheduled the disposition hearing to take place on March 5, 1999. Drug quantity was a contested issue. See United States v. O'Campo, 973 F.2d 1015, 1026 (1st Cir. 1992) ("[T]he base offense level of a co-conspirator at sentencing should reflect only the quantity of drugs he reasonably foresees it is the object of the conspiracy to distribute after he joins the conspiracy."). The relevant measure of drug quantity involved in this case was the number of marijuana plants involved. Leaving recidivism to one side, a defendant convicted of participation in a conspiracy that involves fewer than fifty plants can receive an incarcerative sentence of no more that five years. 21 U.S.C. § 841(b)(1)(D). If the conspiracy involved fifty plants or more, the maximum sentence is twenty years. Id. § 841(b)(1)(C). For a conspiracy of 100 plants or more, the maximum sentence is forty years. Id. § 841(b)(1)(B). Finally, for a conspiracy of 1,000 plants or more, the maximum sentence is life. Id. § 841(b)(1)(A).

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[1] The jury acquitted the petitioner on several other charges, including money laundering. Because the acquitted conduct is not relevant to the issues on appeal, we do not elaborate on those counts.

In this instance, the probation department prepared a presentence investigation report (the PSI Report) concluding that the petitioner was responsible for 213,000 marijuana plants. The petitioner objected, claiming that he could not reasonably have foreseen the vast amounts of marijuana grown underneath his property and elsewhere. On that basis, he argued that his sentence should not be more that five years. See id. § 841 (b)(1)(D) (establishing five-year default statutory maximum for a quantity of marijuana less than fifty plants).

The district court flatly rejected the petitioner's contention. Focusing on the fact that 1,000 plants was the number of marijuana plants needed to trigger a ten-year mandatory minimum sentence, see id. § 841(b)(1)(A), the court stated: "I would have to find that the sky was green to conclude that there weren't at least a thousand plants that were foreseeable in this conspiracy at the time that [the petitioner] entered into it . . . " That said, the court proceeded to calculate the total number of plants attributable to the petitioner. The court presumed that the petitioner reasonably could have foreseen an output of 200 plants a month (a total of 26,400 plants over the eleven-year span of the conspiracy). The court then sentenced the petitioner to an incarcerative term of 121 months (one month above the applicable statutory minimum).

The petitioner appealed his conviction, but not his sentence. We rejected his direct appeal on May 5, 2000. Derman, 211 F.3d at 177. In the course of that appeal, he assigned no error implicating either the jury instructions or the lower court's assessment of drug quantity.

The petitioner had ninety days from the date of entry of our judgment to file a petition for writ of certiorari to the Supreme Court of the United States. See Sup. Ct. R. 13(1). The Supreme Court decided Apprendi on June 26, 2000 – well within that ninety-day window. Apprendi's core holding is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The petitioner's trial seemingly flouted this principle: after all, the district court did not instruct the jury on a fact – drug quantity – that increased the maximum penalty for the petitioner's crime from five years (the default statutory maximum) to life imprisonment. Compare 21 U.S.C. § 841 (b)(1)(D) with id. § 841(b)(1)(A). The petitioner claims that he instructed his appellate counsel to file a certiorari petition on this ground but that counsel neglected to comply. So ended direct review of the petitioner's conviction and sentence.

The petitioner thereafter retained a new lawyer. On April 27, 2001, he launched a collateral attack in the district court. See 28 U.S.C. § 2255. He asserted that the court had sentenced him in violation of Apprendi, and that he had received ineffective assistance of counsel because his appellate attorney had ignored his instructions to file a petition for a writ of certiorari.

The district court held a hearing on October 9, 2001. Ruling from the bench, the court dismissed the petition. Three days later, the court elaborated on its reasoning in a written rescript. To summarize, the court rejected the petitioner's Apprendi claim for three reasons. It held that Apprendi could not be applied retroactively to the petitioner's habeas claim; that the petitioner had waived any and all objections to his sentence by failing to challenge the sentence on direct appeal; and that, in all events, the district court's failure to submit the drug quantity question to the jury was harmless because the record contained overwhelming evidence that the number of marijuana plants involved in the plot exceeded the number necessary to bring an elevated maximum sentence into play. On much the same basis the court also rejected the petitioner's ineffective assistance claim.

This appeal ensued. We granted a certificate of appealability to decide the Apprendi issues. See 28 U.S.C. § 2253(c).

II. FINALITY

We begin our analysis by determining the applicability of Apprendi to this petition – a determination that requires us to decide when the petitioner's conviction became "final" within the meaning of the relevant statute.

Whether a convicted defendant may find refuge in a rule of criminal procedure newly announced by the Supreme Court depends in large part on timing. If the conviction is not yet final when the Supreme Court announces the rule, then inferior courts must apply that rule to the defendant's case. Griffith v. Kentucky, 479 U.S. 314, 322 (1987). If, however, the conviction is already final, then the defendant ordinarily may not avail himself of the newly announced rule. Teague v. Lane, 489 U.S. 288, 310 (1989).[2]

But words often are chameleons, taking on different shades of meaning in different contexts. The question, then, is how to define the word "final" in this setting. At the time the Court decided Teague, the definition seemed clear: a conviction becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [filed and] finally denied." Griffith, 479 U.S. at 321 n.6.

But the law, by its nature, evolves over time, and the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), casts a shadow on the Griffith definition. In that statute, Congress for the first time established time limits applicable to the

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[2] To be sure, there are certain circumstances in which a newly announced rule may be applied retroactively to a conviction that became final beforehand. See Teague, 489 U.S. at 310. Given the timing here, see text infra, we need not explore these exceptions.

filing of habeas petitions: a prisoner (state or federal) has one year from the date on which his conviction becomes "final" within which to seek federal habeas relief.[3] See28 U.S.C. §§ 2244(d)(1), 2255. In discussing finality in this context, Congress employed slightly different terminology in regard to the time limits applicable to state as opposed to federal prisoners. The one-year period for filing a petition from a state court conviction begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The one-year period for filing a petition challenging a federal court conviction is described more tersely; that period begins to run from and after "the date on which the judgment of conviction becomes final . . . ." Id. § 2255.

In Gendron v. Unites States, 154 F.3d 672 (7th Cir. 1998) (per curium), the Seventh Circuit determined that the linguistic differences in the two provisions meant that Congress intended divergent versions of the finality for state and federal convictions. The court reasoned that "[w]here Congress included particular language in one section of an act but omits it another section of the same act, . . . the language will not be implied where it has been excluded." Id. At 674. Since Congress used the phrase "expiration of the time for seeking such review" only in regard to state prisoners, the court concluded that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the dated [the court of appeals] issues the mandate in their direct criminal appeal." Id.

In Kapral v. United States, 166 F.3d 565 (3d Cir. 1999), the Third Circuit took issue with this interpretation. The court expressed concern that Gendron invited a series

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[3] This one-year limit is subject to certain periods of tolling. See, e.g., Neverson v. Bissonnette, 261 F.3d 120, 124 (1st Cir. 2001). These refinements are not relevant here.

of unfortunate results. Taken at face value, the Gendron rationale means that a federal prisoner can file a collateral attack in the district court and then continue his pursuit of direct review by filing a certiorari petition. Id. At 570-71. Moreover, under that rationale, finality will be defined differently for limitation purposes that for purposes of the Teague "new rule" analysis. Id. at 572. Last – but far from least – the Gendron rationale creates an artificial distinction between state and federal prisoners – a distinction that Congress, given the common origin and purpose of the two AEDPA provisions, would have had no reason to draw. Id. at 575. In light of these realities, the court determined that Congress intended sections 2244 and 2255 to operate on the same time line. Id. Thus, under the Third Circuit's reading of the AEDPA, a conviction – whether state or federal – does not become final until "the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires." Id. at 577.

Although the Fourth Circuit has followed Gendron, see United States v. Torres, 211 F.3d 836, 839-41 (4th Cir. 2000), a clear majority of the circuit courts that have addressed the question have marched in lockstep with Kapral. See, e.g., Kaufmann v. United States, 282 F.3d 1336, 1339 (11th Cir. 2002); United States v. Garcia, 210 F.3d 1058, 1060 (9th Cir. 2000); United States v. Gamble, 208 F.3d 536, 536-37 (5th Cir. 200) (per curiam); United States v. Burch, 202 F.3d 1274, 1279 (10th Cir. 2000). We too find the Kapral formulation the more persuasive. While it would be pleonastic to rehearse the Third Circuit's analysis, we feel obliged to emphasize a factor that has special relevance to the instant appeal: the relationship between the finality of the defendant's conviction and the announcement of new rules of criminal procedure by the Supreme Court.

Five years after Teague was decided, the Court made pellucid that "[a] state conviction and sentence become final for purposes of [the Teague analysis] when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Accordingly, were we to follow Gendron's lead and distinguish between the finality of state and federal convictions, we would be forced to deny federal prisoners the benefit of a new rule available to similarly situated state prisoners. Such a result is counter-intuitive, and we do not think that Congress intended the nature of the particular sovereign detaining the prisoner to have such a powerful impact on which defendants may avail themselves of a new rule. Indeed, we can discern no sensible reason why Congress might wish to classify prisoners in this peculiar manner – and under the best circumstances, such a taxonomy would be difficult to administer.

Certainly, the minor variation in language between section 2244 and section 2255, respectively, does not demand such an awkward result. Section 2255 directs that a federal court judgment be "final" – and that term has a well-defined meaning in federal law. See, e.g., Griffith, 479 U.S. at 321 n.6; Hanover Ins. Co. v. United States, 880 F.2d 1503, 1509 (1st Cir. 1989). Section 2244 contains the same directive with respect to state court convictions, but finality is a concept that has differing meanings under the laws of the several states. Compare, e.g., Warren v. State, 833 S.W.2d 101, 102 (Tenn. Crim. App. 1992) ("If one convicted of a crime takes no action to perfect his right to appeal, the statute of limitations begins to run from the date of final conviction"), with, e.g., Mont. Code. Ann. § 46-21-102(1) (defining finality for purposes of state habeas proceedings in a manner similar to 28 U.S.C. § 2244(d)(1)(A)). Thus, Congress

chose to ensure uniformity by explaining what "final" means in the context of a federal habeas petition that seeks to challenge a state court conviction. No similar need existed with respect to federal court convictions (and, thus, the explanatory language was omitted in section 2255).

We will not paint the lily. We hold that a conviction for a federal defendant who fails to file a petition for a writ of certiorari becomes final when the period in which he seasonably might have done so expires. This levels the playing field as between state and federal prisoners desirous of seeking federal relief.

Our construction of section 2255 resolves the threshold question presented in this appeal. Because the Supreme Court decided Apprendi while the petitioner still had breathing room within which to file a petition for certiorari, his conviction was not yet final at that time. It follows inexorably that the Apprendi rule applies to the petitioner's case. Griffith, 479 U.S. at 322. What remains to be seen is whether Apprendi aids the petitioner's cause.

III. THE MERITS

We next trace the contours of the Apprendi error that occurred during the petitioner's trial and decide whether it necessitates vacation of the petitioner's sentence.

A. The Apprendi Error

The government concedes that the petitioner's case suffers from a strain of Apprendi error. In hindsight, the trial court should have asked the jury to determine, beyond a reasonable doubt, whether the underlying conspiracy involved a drug quantity sufficient to trigger a sentence higher than the five-year default statutory maximum. See United States v. Barnes, 244 F.3d 172, 177-78 (1st Cir.) (explaining the genesis of the default statutory maximum in an analogous context), cert. denied, 122 S. Ct. 379 (2001); see also 21 U.S.C. § 841 (b)(1)(D) (setting five-year maximum for a conspiracy involving fewer than fifty marijuana plants). Absent such a determination, the

sentence imposed by the district court – ten years and one month – is open to question.

The petitioner tries to define the district court's error more broadly. He asserts that the court transgressed Apprendi by determining the drug quantity that was reasonably foreseeable to him rather than tendering that question to the jury. In other words, he claims that the court should have submitted to the jurors not only the question of drug quantity vis-à-vis the conspiracy but also the individualized question of what drug quantity was attributable to him as a coconspirator. We do not agree: the Apprendi error is far narrower in scope than the petitioner suggests.

In Edwards v. United States, 523 U.S. 511 (1998), the Supreme Court held that, as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum applicable to that conspiracy, the court may "determine both the amount and the kind of 'controlled substances' for which [the] defendant should be held accountable – and then... impose a sentence that varies depending upon amount and kind." Id. at 513-14. Apprendi, decided two years later, did not purport to overrule Edwards, and the two decisions are easily harmonized: in a drug conspiracy case, the jury should determine the existence vel non of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum;[4] and the judge should

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[4] This does not mean that a jury need return a special verdict describing the precise amount of drugs involved in the conspiracy. It is enough that the jury supportably determines, beyond a reasonable doubt, that the conspiracy involves a drug quantity that surpasses the threshold amount needed to trigger the relevant (higher) statutory maximum. See e.g., United States v. Patterson, 292 F.3d 615, 623 (9th Cir. 2002) (finding no Apprendi error when jury returned a guilty verdict after being instructed on only a threshold quantity).

determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy. See Edwards, 523 U.S. at 514. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination). Cf. United States v. Eirby, 262 F.3d 31, 37 (1st Cir. 2001) (holding post-Apprendi, that when a sentence falls within the statutory maximum, "judicial determination of drug quantity under a preponderance-of-the-evidence standard remains a viable option"). The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole (e.g., that the conspiracy involved at least 1,000 marijuana plants). See United States v. Patterson, 292 F.3d 615, 623 (9th Cir. 2002) (upholding conviction based on jury finding that the defendant was guilty of manufacturing 100 or more plants, although the jury was not instructed to determine the exact amount).

The decisions cited by the petitioner in support of a contrary rule do not withstand scrutiny. He relies chiefly on United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000), but no extended discussion of that decision is warranted. It suffices to say that the Ninth Circuit severely limited Nordby's reach in United States v. Buckland, 289 F.3d 558, 567-68 (9th Cir. 2002) (en banc), and then issued a decision in Patterson that coheres with the decision we reach today. See Patterson, 292 F.3d at 623.

Our recent opinion in United States v. Bailey, 270 F.3d 83 (1st Cir. 2001), does not advance the petitioner's

position. There, the defendant argued that the jury – and not the judge – should have decided the quantity of drugs attributed to him at sentencing. Id. at 85-86. We agreed that, because the defendant had been sentenced to a term above the default statutory maximum, an Apprendi error had occurred. Id. at 89. We then considered whether the error was harmless and concluded that it was not; the evidence needed to boost the statutory maximum to the next level was sketchy and permitted a reasonable factfinder to decide the drug quantity issue either way. Id. at 89-90. Consequently, we vacated the sentence and remanded for resentencing. Id. at 90. The decisive factor in Bailey, however, was the government's inability to prove beyond a reasonable doubt that the conspiracy involved the requisite drug quantity necessary to elevate the applicable statutory maximum to the next level. That weakness is not present here. See infra Part III(B).

To summarize, we conclude that an Apprendi error occurred, but that the trial court's determination that the petitioner reasonably could have foreseen that the conspiracy would encompass at least 26,400 marijuana plants should not be regarded as part and parcel of that error. See Edwards, 523 U.S. at 513-14. Instead, the Apprendi error relates to the failure to have the jury determine the number of plants involved in the conspiracy. It is to the effect of that error that we now turn.

B. The Effect of the Error.

The next step in the pavane requires that we determine whether the discerned error invalidated the petitioner's sentence. On this point, the petitioner faces an uphill climb. The fact that Apprendi is available to him in theory (because his conviction was not yet final when Apprendi was decided) does not mean that he can take advantage of that decision in practice; the rub is that he failed either to object to the jury instructions or to contest the trial court's sentencing determination on direct appeal. These omissions transgress the general rule that a criminal

defendant must seasonably advance an objection to a potential constitutional infirmity in order to preserve the point for collateral attack.[5] See Burks v. Dubois, 55 F.3d 712, 716 (1st Cir. 1995).

The rationale behind the rule is straightforward:

> A contemporaneous objection enabled the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

Wainwright v. Sykes, 433 U.S. 72, 88 (1977). Moreover, the rule prevents "'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." Id. at 89.

The petitioner concedes that he failed to raise and preserve an Apprendi objection at his trial, but he nonetheless seeks to avoid any penalty for his procedural default on the ground that Apprendi changed the traditional method of determining drug quantity for sentencing purposes, and, thus, constituted a watershed decision. Whether or not this characterization of Apprendi is apt, the petitioner's argument is misguided. The inquiry into the applicability of the procedural default rule is, for the most part, black or white" either the defendant proffered a timely objection or he did not. While there are few exceptions, see, e.g., Bousley v. United States, 523

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[5] This rule was first developed in the context of examinations by federal habeas courts into independent and adequate grounds for procedural default in state trials. E.g., Wainwright v. Sykes, 433 U.S. 72, 86-89 (1977). The Supreme Court has extended the rule to federal convictions. E.g., Bousley v. United States, 523 U.S. 614, 622 (1998).

U.S. 614, 621-22 (1998) (discussing exception for claims that could not be presented without further factual development, e.g., a claim that a guilty plea was coerced), the subsequent announcement of a Supreme Court ruling – whether or nor it blazes new trails – is not one of them.[6]

Bousley illustrates the point. That case involved a habeas application prosecuted by an individual who had pleaded guilty to a federal firearms offense that was later circumscribed by the Court. Id. at 616-18 (citing Bailey v. United States, 516 U.S. 137, 143-50 (1995)). Even though the defendant entered his plea without knowing that the Court subsequently would curtail the statute in a way that might have affected the outcome of his case, the Court performed an archetypical procedural default analysis when it considered his habeas petition. See id. at 621-22. We wee no principled distinction here.

We thus proceed to the question of whether the petitioner's procedural default is excused. A defendant can surmount this hurdle in one of two ways. First, he can

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[6] This is not to say that how one categorizes Apprendi is irrelevant. Whether Apprendi may properly be classified as a watershed opinion and whether the petitioner could have foreseen the Court's ruling are factors that go to the "cause" prong of the procedural default analysis. See Bousley, 523 U.S. at 623. Those courts of appeals that have grappled with these questions to date have held unanimously that Apprendi was not a watershed decision, that the Court's opinion was foreseeable to criminal defendants, and, therefore, that no cause existed sufficient to excuse a procedural default. E.g., McCoy v. United States, 266 F.3d 1245, 1258-59 (11th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002); United States v. Moss, 252 F.3d 993, 1001-03 (8th Cir. 2001), cert. denied, 122 S. Ct. 848 (2002); United States v. Sanders, 247 F.3d 139, 145-56 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001); United States v. Smith, 241 F.3d 546, 548-59 (7th Cir.), cert. denied, 122 S. Ct. 267 (2001). We recognize however, that most of these decisions produced vociferous dissents, see, e.g., McCoy, 266 F.3d at 1272-74 (Barkett, J., dissenting); Moss, 252 F.3d at 1005-06 (R. Arnold, J., dissenting), and given the utter absence of any prejudice here, it would serve no useful purpose to dive gratuitously into these murky waters.

offer evidence sufficient to prove that he is actually innocent of the underlying charge. Id. at 622. The petitioner makes no such claim.

The second way in which a defendant can clear the procedural default hurdle is by showing good cause for the default and actual prejudice resulting therefrom. Burks, 55 F.3d at 716. We use the conjunctive purposefully because the defendant must carry the devoir of persuasion as to both cause and prejudice. Id. Because the petitioner in this case has not sufficiently demonstrated prejudice, see text infra, we need not inquire into the question of cause.[7]

The showing of prejudice needed to cure a procedural default generally requires a habeas petitioner to demonstrate "that 'there is a reasonable probability' that the result of the trial would have been different" absent the error. Strickler v. Green, 527 U.S. 263, 289 (1999) (quoting Kyles v. Whitely, 514 U.S. 419, 433 (1995)). The question is not whether the petitioner, qua defendant, would more likely have received a different verdict had the error not occurred, but whether he received a fair trial, understood as a trial worthy of confidence, notwithstanding the bevue. See Kyles, 514 U.S. at 434; see also Prou v. United States, 199 F.3d 37, 49 (equating the prejudice standard for ineffective assistance cases with the standard for showing cause and prejudice under United States v. Frady, 456 U.S. 152 (1982)).

To be sure, the Supreme Court has not elaborated the precise definition of the cause and prejudice standard for all claims. See Amadeo v. Zant, 486 U.S. 214, 221

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[7] This means, of course, that we need not dwell on the petitioner's allegation that his appellate counsel was ineffective in failing to file a petition for certiorari. It bears mention, however, that the Supreme Court has explicitly held that the failure to file a petition for discretionary review cannot constitute a cognizable ineffective assistance of counsel, and, thus, such a failure cannot constitute cause sufficient to excuse a procedural default. Coleman v. Thompson, 501 U.S. 722, 752-53 (1991).

(1988).[8] Still, any error that results in unfairness so patent as to violate the Due Process Clause will necessarily satisfy the Strickler and Kyles standards. See Murrary v. Carrier, 477 U.S. 478, 494 (1986).

We analyze the issue of prejudice based on an examination of the record as a whole. See Frady, 456 U.S. at 169. Here, our inquiry focuses on the likelihood that the jury, had it been asked the question, would have found that the underlying conspiracy involved the manufacture and distribution of at least fifty marijuana plants. See 21 U.S.C. § 841(b)(1)(C); see also Harris v. United States, 122 S. Ct. 2406, 2418 (2002). The burden rests with the petitioner to show that there is a reasonable probability that the jury would have reached a different, more favorable conclusion. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Burks, 55 F.3d at 716.

This inquiry need not detain us. The evidence is commanding that the conspiracy of which the appellant was a member involved far more than fifty plants, and that any rational jury would have found as much. After all, during the course of the trial the government presented detailed evidence about the size, scope, and inner workings of the criminal cabal. During the seven years that he coconspirators operated the underground greenhouse on the petitioner's property, marijuana was grown in three rooms. Two rooms were 104 feet long and 36 feet wide, and the other 72 feet long and 38 feet wide. The facility was equipped with special air-conditioning and heating systems, and was powered by an independent

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[8] The Court recently held, however, that a defendant's failure to object to an Apprendi error at trial engenders plain error review on direct appeal. United States v. Cotton, 122 S. Ct. 1781, 1785 (2002). This is a rigorous standard – under it, a court will reverse a conviction only if, among other things, the error seriously affected the fairness, integrity, or public reputation of the trial – but the showing of prejudice required to excuse a procedural default is even more demanding. Frady, 456 U.S. at 166.

generator. At its high point, the underground greenhouse housed as many as 20,000 plants. Individual harvests yielded as many as 5,000 plants. The alternate site was on the same order of magnitude; the government seized 5,600 plants when it raided the premises in 1995.

In a nutshell, no reasonable juror could have found that the conspiracy involved fewer than several thousand marijuana plants. The evidence of the size and duration of the operation was copious. So too was the evidence of the petitioner's participation in the enterprise (indeed, he does not now contest that the government adequately tied him to the marijuana-growing operation). Fairly viewed, the record as a whole does not lend credence to the petitioner's plaint that the outcome might have been different but for the Apprendi error.

In an effort to blunt the force of this conclusion, the petitioner argues that, had the district court consigned the drug-quantity issue to the jury, he would have contested that issue more vigorously. This argument rings hollow. The indictment explicitly stated that the petitioner was charged with conspiracy in the manufacture and distribution of 1,000 or more marijuana plants, and he was thus on notice that he faced a mandatory minimum sentence of ten years unless he could cast doubt upon that allegation. That was incentive enough to mount as robust a challenge as possible. And to cinch matters, the petitioner has alluded no evidence upon which he could have based a credible claim that the conspiracy involved only a small number of marijuana plants.

The petitioner also posits that he did not know of the breadth of the conspiracy, and, thus, could not have foreseen the number of plants attributed to him at sentencing. That argument is moot. As we have said, once it was established that the petitioner was a participant in a conspiracy that involved at least fifty marijuana plants, the district court was free, under Edwards and Apprendi, to determine foreseeability and sentence the petitioner within

the elevated statutory maximum. The court did so – and the petitioner eschewed a timely challenge to that determination.[9]

IV. CONCLUSION

We need go no further. Although the jury instruction in this case did not anticipate Apprendi, that unpreserved error did not result in cognizable prejudice. Neither the petitioner's trial nor his sentence were fundamentally unfair. Under the circumstances, the district court appropriately denied the application for post-conviction relief.

Affirmed.

[9] Even were the issue of foreseeability still open, the district court's findings seem unimpugnable. Given the sheer size of the marijuana-growing operation, its duration, and the mass of evidence indicating that the petitioner played an integral role in it, there is no realistic possibility, let alone a reasonable probability, that a jury would have attributed fewer than fifty marijuana plants to him.

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Respondent, Appellee.

ERRATA SHEET

The opinion of this Court issued on July 25, 2002 is corrected as follows:

One page 9, line 19, insert "in" between "it" and "another"